APPEAL NO. 93057

On November 13, 1992, a contested case hearing was held in (city) Texas, (hearing officer) presiding as hearing officer. He determined that although the appellant (claimant) gave timely notice of her asserted injury, that the injury to her lower back was the result of an ordinary disease of life to which the general public is exposed outside of employment. Benefits were denied under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). Claimant disagrees with the hearing officer's statement of the case in several respects and finds fault with several of his findings of fact. Respondent (carrier) urges that the decision be affirmed.

DECISION

Finding the evidence sufficient to support the determination of the hearing officer in denying benefits in this case, we affirm with modification.

Two issues were presented at the contested case hearing: (1) did the claimant sustain an injury in the course and scope of her employment, and (2) was such injury reported within 30 days of the date on which the claimant knew or should have known that it might be related to her employment. With regard to the second issue, the hearing officer determined the claimant did make timely notification, that issue is not on appeal, and will not be addressed herein.

Concerning the injury in question, the claimant testified that she is 59 years old and had worked as a cook for the employer (Head Start Child Development Center) for approximately seven years. She prepared two meals and a snack daily for about 60 and sometimes 70 individuals and did associated tasks such as ordering the groceries, receiving them, and putting them away. She also handled trays of dishes although she had an assistant who washed the dishes. She indicated that she had always had problems with her back including those stemming from a back injury in 1988, that she would call in every now and then when her back gave her problems and that she seemed to have more back trouble after she had a hysterectomy in 1989. She stated she had mentioned her continuing back problems to (Dr. D) in late 1989, and when she went in for a yearly physical in February 1992, Dr. D noted complaints "of pain in her right hip radiating. . .to a point below her knee." She stated that she continued seeing Dr. D following her surgery in 1989 and that he concluded she had arthritis and suggested she take "Advil." She testified that her back became worse and she stopped working on April 13th. She also stated that although she was not working, she was still doing all of her own cooking, cleaning and housework.

After her physical in February 1992, Dr. D referred her to a neurologist, Dr. C who indicated to her that she had a "slipped disc which had caused a pinched nerve." She stated that Dr. C told her that her condition was caused by lifting and bending and that her condition might be caused by her work. She stated he took her off work although he indicated she might be able to perform light duty. She stated that she told her supervisor about her condition and that she would not be able to work. The claimant inquired about

"medical leave" and the supervisor told her they did not have "medical leave" but that she could take six weeks of sick leave and accrued vacation time. The claimant subsequently asked the supervisor when workers' compensation benefits would "kick in" but the supervisor told her that she had no information and that the claimant would have to take care of the matter herself. The claimant talked to a friend and contacted the Workers' Compensation Commission and filed a claim.

A statement from Dr. D in the file indicates his opinion that the claimant's gynecologic surgery had nothing to do with her back pain. Several statements from Dr. C were admitted into evidence. He indicated that the claimant's MRI showed a disc herniation at L5-S1 and mild disc bulge at L4-5. In these statements, Dr. C indicates at one point that the claimant has had back pain since a back injury in 1988 and that following her surgery in 1989 she started having increased pain in the right hip and right lower extremity. He notes that she says the pain has been constant, that the pain starts in the right hip, going along the posterolateral aspect of the thigh and leg to the big toe. He also states that she has low back pain of an aching type and that it is worse with standing, prolonged sitting, and walking, and that "there is no enhancement of pain with straining." In a statement dated May 22, 1992, Dr. C states that he saw the claimant for a follow up on "5-21-92" and that:

Patient is doing reasonably well. She has some pain on a daily basis, but when she mops the floor, bends or lifts things at home, she gets significant pain. As long as she does not do those activities, she can tolerate the pain.

Patient works as a cook in her job. She has to bend frequently and lift groceries frequently. She has not been able to do her job.

An interview of the assistant who washes dishes indicated that the claimant had regularly complained about her back over a long period of time, about two to four years. She also indicated that the claimant did not lift boxes of groceries, rather the delivery people would put the boxes of groceries in the pantry and she would put the individual items away.

In pertinent part, the hearing officer's findings and conclusions are as follows:

FINDINGS OF FACT

4. The Claimant had a chronic back condition which was associated, in part, with a work-related injury she apparently sustained in 1988.

5. The symptom of the pain in her lower back radiating through her right hip and down through her right knee predates the alleged January 6, 1992, date of injury.

6. None of the medical records, including those introduced by the Claimant, reflect

the Claimant was maintaining she had a work-related injury prior to late May or early June of 1992.

7.Although it was determined on, or shortly after, March 27, 1992, that the Claimant had a herniated disc, it is just as likely this condition was caused by the Claimant's activities outside of work as it was by her activities on the job.

8.The Claimant informed her supervisor, in late May or early June of 1992 that she was maintaining she had sustained an injury at work.

CONCLUSIONS OF LAW

2.The claimant did not sustain an injury in the course and scope of her employment.

3.The injury to the Claimant's lower back is a result of an ordinary disease of life to which the general public is exposed outside of employment.

A compensable injury is an injury that arises out of and in the course and scope of employment for which compensation is payable under the 1989 Act. Article 8308-1.03(10) The term injury includes occupational diseases (Article 8308-1.03(27)) which is defined as

a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body. The term includes other diseases or infections that naturally result from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease. The term includes repetitive trauma injuries. Article 8308-1.03(36)

We have previously stated that this definition does not require that a decision in regard to occupational disease also include a finding as to whether an ordinary disease exists. Texas Workers' Compensation Commission Appeal No. 92715, decided February 16, 1993. And, as we observed in Texas Workers' Compensation Commission Appeal No. 93010, decided February 16, 1993, quoting Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ), "[t]herefore, we find that it is not necessary to reach a determination of whether Hernandez' injury is an "ordinary disease"; rather, the test is whether there is evidence, either direct or indirect, of a causal connection between her disease and her employment. . . ."

To recover for occupational disease caused by repetitive traumatic activities required by a claimant's job, he or she "must not only prove that repetitious physical traumatic

activities occurred on the job, but also prove that a causal link existed between these activities on the job and [his or her] incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally." Davis v. Employers Insurance of Wausau, 694 S. W.2d 105,107 (Tex.App-Houston [14th Dist] 1985, writ ref'd n.r.e.). In that case, the appeals court held that the trial court abused its discretion in disregarding a jury's finding and granting judgment n.o.v. where the record contained at least some evidence that claimant was harmed (back injury) by repetitious physical traumatic activities on her job as a flight attendant which required handling heavy carts and trash containers, twisting into awkward positions, and bending and reaching. The Court went on to state:

> We issue this opinion with one caveat. Our decision applies narrowly to the facts presented by this case. Each claim for an occupational disease must be judged on a case-by-case basis. The jury in the instant case, as the sole judge of the weight and credibility of the evidence, evaluated the testimony and answered the correctly submitted special issues in favor of (claimant). Because there was at least *some* evidence in the record to support the jury's finding, we cannot sustain the judgement n.o.v. This result does not mean that we are inclined to expand the definition of "occupational disease" beyond the original intent of the legislature.

Authority for holding that a back injury or strain can result from repetitive traumatic activity and be compensable as an occupational disease seems to hinge on key factors involving the distinctive conditions or exertions of the employment. *See generally* Larson, Workmen's Compensation Law, Vol. 1B, §§ 41.33(b) & 41.42, Matthew Bender 1992. The particular factual setting of the case as indicated in Davis, *supra*, is a determinative factor. Whether or not conditions underlying a claim for workers' compensation benefits based on an alleged occupational disease render it compensable is a question of fact subject to proof. Petray v. The Travelers Insurance Co., 393 S.W.2d 711 (Tex. Civ. App.-Texarkana 1965, writ ref'd n.r.e.). As in any injury, there must be a causal connection between the condition under which the claimant's work was performed and the resulting injury. Garcia v. Texas Indemnity Insurance Co. 209 S.W.2d 333 (Tex. 1948); We have previously upheld findings, in the particular factual setting of the case, that a back injury was not the result of work related repetitive traumatic activity and not compensable. Texas Workers' Compensation Commission Appeal No. 92651, decided January 14, 1993; Texas Workers' Compensation Commission Appeal No. 92623, decided January 21, 1993; Texas Workers' Compensation Commission Appeal No. 92601, decided December 22, 1992; Texas Workers' Compensation Commission Appeal No. 92544, decided November 30, 1992.

While we disassociate ourselves from any implication that a herniated disc is, per force, an ordinary disease of life to which the general public is exposed outside of employment, the hearing officer here was of the opinion that, under the particular circumstances of this case, the distinctive conditions and exertions of the claimant's job were not such that her back injury or condition was causally connected to the job. Whether, given the setting of this case, the back injury or condition can be classified as an ordinary disease of life, as such, as it related to the claimant, is not of pivotal importance. Hernandez, *supra*. Clearly, the hearing officer determined that "it is just as likely this condition was caused by Claimant's activities outside of work as it was by her activities on the job," and concluded she "did not sustain an injury in the course and scope of her employment." There was sufficient evidence of record to uphold this critical finding and the conclusion flowing therefrom. As the hearing officer, he is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). Where the evidence before the fact finder is sufficient to support his determinations, and those determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, there is no sound basis to disturb his decision. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. The hearing officer could reasonably believe all, part or none of the testimony of a particular witness, including that of the claimant. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.); Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). From the claimant's own testimony concerning her prior back injury and the duration of her continuing back problem and its progression, her description of her job responsibilities and duties, and her other similar type activities outside the work place, together with the medical statements in evidence, the hearing officer had a sufficient basis to conclude she did not sustain an injury in the course and scope of her employment. Whether or not a disc herniation necessarily requires some traumatic activity was not specifically addressed in any of the medical evidence at the hearing. Although not a part of the hearing or decision in this case, we observe that expert medical evidence that disc herniation frequently happens without trauma was admitted and considered in Texas Workers' Compensation Commission Appeal No. 92316, decided August 21, 1992.

Claimant posits that reversal is in order because the Workers' Compensation Act is to be liberally construed and that any reasonable doubt as to the right of an injured party to compensation is to be resolved in the injured party's favor. At the hearing, carrier argued that the Appeals Panel has stated that the Workers' Compensation Act is not to be liberally construed in favor of the claimant citing Texas Workers' Compensation Appeal No. 92090, decided April 24, 1992. Carrier misstates the Appeals Panel's decisions. While observing that there are no Texas court decisions holding that the 1989 Act is to be "liberally construed," and that no sound basis has been found to apply the doctrine as requested by the appellant in that case, Appeal 92090 was addressing a factual dispute and refused to

overturn the hearing officer's factual determinations based on a "liberally construed" doctrine. Similarly, we noted in Texas Workers' Compensation Commission Appeal No. 91101, decided January 27, 1992, (timely notice being in issue) where the appellant urged a liberal interpretation on a factual matter, that "[w]hile no court has characterized any part of the 1989 Act as subject to being liberally construed, we believe the cases cited (by the appellant) do not control for other reasons." The decision goes on to observe that, in essence, what the appellant urged to be liberally construed was a factual matter rather than an application of a provision of law to a set of facts. We do not believe the weight of authority extends "liberal interpretation" to questions of fact. The Texas Supreme Court in Jackson v. U.S. Fidelity and Guaranty Co., 689 S.W.2d 408, 411 (Tex. 1985), referred to the doctrine and stated, [t]his case, however involves a determination of the facts, "rather than the law" and goes on to state "[t]herefore, the act itself offers nothing to resolve this case, and the rule of liberal construction certainly does not authorize liberally construing ambiguous fact findings in favor of the claimant." The cases cited by claimant involve interpretations by the court of provisions of the statute to a given factual setting. In Texas Employers Insurance Association v. Duree, 798 S.W.2d 406 (Tex. App.-Fort Worth 1990, writ denied) the court gave a broad interpretation to the statutory terms "sudden and immediate" and held 10 days came within that term. In Northbrook National Insurance Co. v. Goodwin, 676 S.W.2d 451 (Tex. App.-Houston [1st Dist] 1984, writ ref'd n.r.e.) the court, in upholding a jury finding, "liberally" construed the statute and determined that angina pectoris fell within the term "heart attack." Similarly, in Stott v. Texas Employers Insurance Association, 645 S.W.2d 778 (Tex. 1983) and Bailey v. American General Insurance Co., 279 S.W.2d 315 (Tex. 1955) the court was concerned with interpreting provisions of the statute and applying factual setting to those provisions. This is not the situation in this case and the matter of "liberal" construction or interpretation is not the issue. In this regard, Appeals Panels have applied "broad" and "ungrudging" interpretations of provisions of the 1989 Act e.g. in whether a given set of facts meets certain notice requirements. *See* Texas Workers' Compensation Commission Appeal No. 92661, decided January 28, 1993; Texas Workers' Compensation Commission Appeal No. 92694, decided February 8, 1993.

Determining there was sufficient evidence to support the factual determinations of the hearing officer and that his conclusion that the claimant did not sustain an injury in the course and scope of her employment is supported by those factual determinations, we affirm his decision and order. His conclusion that her back injury is a result of an ordinary disease of life to which the general public is exposed outside of employment is unnecessary to the resolution of this case and is surplusage, Hernandez, *supra*, We specifically do not hold that a herniated disc is, per force, an ordinary disease of life to which the general public is exposed outside employment and do not determine whether it is so under limited conditions similar to the factual setting of this case. The decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge